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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1116

WILLIAM E. BUFALINO,
Petitioner,

v.

THE MICHIGAN BELL TELEPHONE COMPANY, FRANK KAMINSKI, ROBERT KOSS, HOLLIS BALLEW, ROBERT BULLOCK, ALBERT C. CARR, DINO CONSTANTINI, WILLIAM DePUGH, VICTOR DeWOLF (alias Victor Dukes), MARVIN GILLESPIE, HOWARD GLADUE, ALBERT C. LANGTRY, EARL MILLER, FRANK MONTANA, ALBERT NORMALI, WILLIAM NOSEWORTHY, GEORGE O'CONNOR, JACK D. PENLAND, VINCENT PIERSANTE, ARNOLD J. PINN, PAUL QUAGLIA, BILLIE STARKS and Does, One to Thirty-One Inclusive,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

(For List of Attorneys, see Inside Front Cover.)

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WO. 2-8745—WO. 2-8732

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STATEMENT

This Brief is filed on behalf of ten respondents, all City of Detroit policemen, as to whom this action was dismissed by the District Court. The narrow ground of dismissal did not involve Federal issues, either constitutional or statutory. Both the District Court and the Court of Appeals for the Sixth Circuit held that petitioner's claim against these respondents was barred by the Michigan Statute of Limitations (Petitioner's Appendix A, page 41), unless it was tolled by the fraudulent concealment of the cause of action by these respondents. The Court of Appeals held petitioner failed to plead specific incidents raising questions of fact as to fraudulent concealment of the cause of action by these respondents as required by *Beaubien v. Beaubien,* 64 U.S. 190 (1859), and *Janiszewski v. Behrmann,* 345 Mich. 8 (1956), (Petitioner's Appendix A, p. 42).

As to four other policemen, the Court of Appeals went outside the facts pleaded in petitioner's Amended Complaint, to an Affidavit filed by petitioner in connection with the Motion for Summary Judgment made by the respondent telephone company and its employees, and held that petitioner's complaint stated a claim upon which relief could be granted as to these four policemen, with respect to incidents related in the affidavit.

ARGUMENT

The only reason for granting the writ given by petitioner, having any application to these respondents, is set out in the heading numbered VI. It is contended by petitioner that when an actionable wrong has been committed, and a cause of action is fraudulently concealed, recovery under the Federal procedure must be granted, and relief cannot be denied because the complainant does not plead, with specific particularity, facts which are peculiarly within the knowledge of the named respondents (Petitioner's Brief, p. 24). No citation of authority in support of this settlement is made in petitioner's brief. Petitioner attempts to gloss over his failure to provide the court with precedent by launching into a discussion of allegations against respondent Albert Langtry. The argument appears to attempt to make a factual connection between respondent Langtry, and some of the respondents on whose behalf this brief is filed. Nowhere, even in the testimony of Langtry, quoted in petitioner's brief, is there any indication of specific incidents of fraudulently concealed activity on the part of either respondent Langtry or any of the ten respondents on whose behalf this brief is filed, which in any way affected petitioner.

Petitioner's brief contains the same conclusory allegations in argument as were made in his Amended Complaint. These conclusory allegations were held by both the District Court and the Court of Appeals to be insufficient to toll the Michigan Statute of Limitations. We believe that this issue was correctly decided, as to these ten respondents, in both courts below.

The cases uniformly hold that mere silence on the part of the defendant does not constitute fraudulent conceal-

ment which will toll the period of limitation, except in cases where the gravamen of the complaint is fraud, or in cases where there is a fiduciary relationship existing between the plaintiff and the defendant which gives rise to a duty in the defendant to speak. In all other cases, affirmative, specific and fraudulent acts of the defendant must be shown in order to constitute fraudulent concealment so as to toll the period of limitations.

In *Draws v. Levin,* 332 Mich. 447, the Michigan Supreme Court said, at page 452:

> "When the basis of the action is some wrong other than a fraud, the fraudulent concealment which will work a postponement of the statute must be a concealment produced by affirmative acts or misrepresentations. A mere silence on the part of the defendant is not enough. The plaintiff must show some arrangement or contrivance on the part of the defendant of an affirmative character, designed to prevent subsequent discovery. The rule in question prohibits the defendant from doing at any time anything to prevent the plaintiff from ascertaining subsequently to the transaction out of which the right of action arises the facts upon which it depends, either by affirmative action which conceals the truth, or by any device which avoids inquiry that would lead to discovery. * * *"

In petitioner's Amended Complaint, the charge of fraudulent concealment is repeated in numerous paragraphs, but nowhere in the complaint does the charge go beyond mere conclusory allegation. Nowhere in the Amended Complaint are specific acts of fraud or concealment alleged against any of these ten respondents, nor is the time when such acts were discovered set out with particularity.

In *Beaubien v. Beaubien,* 64 U.S. 190, the court in applying Michigan Law, said:

> "The pleader has sought to avoid the operation of the limitation, by an averment of concealment and fraud on the part of the defendants, and those under whom they claim. * * * (The) averment is too general and indefinite to have the effect to avoid the operation of the statute. The particular acts of fraud or concealment should have been set forth by distinct averments, as well as the time when discovered, so that the court may see whether, by the exercise of ordinary diligence, the discovery might not have been before made."

Petitioner has failed, totally, to meet the requirement of specificity laid down in *Beaubien, supra,* and has wholly failed to effectively raise a question of fraudulent concealment which would toll the Statute of Limitations, Michigan Compiled Laws, 1948, Sec. 600.5805; Michigan Statutes Anno., 27A.5805 (7), which provides, in pertinent part:

> "The period of limitation is three years for all other actions to recover damages for injuries to persons and property."

Michigan Compiled Laws of 1948, Sec. 600.5885, provides:

> "If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations."

Petitioner's action was, and should have been dismissed by the District Court for failure to plead specific acts of fraudulent concealment by these ten respondents.

CONCLUSION

The petition for a Writ of Certiorari should be denied as to these ten respondents because no important question of Federal law has been raised by the pleadings in respect to these respondents. It certainly should be incumbent upon the petitioner to present such important questions as he feels are raised by the circumstances out of which this case allegedly arose upon carefully drawn pleadings rather than the rambling, conclusory, patchwork Amended Complaint upon which the courts below were asked to pass.

Respectfully submitted,

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